UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, as Next Friend	§	
Of A.C., a minor, And	§	
Justin Ho-Wee Wong	§	
	§	
	§	
Plaintiffs,	§	CAUSE NO. 3:07-CV-01767
v.	§	
	§	
	§	
Virgin Mobile Pty Ltd.	§	
	§	
Defendant.	§	
	§	

PLAINTIFFS' SUR-REPLY TO DEFENDANT'S REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs, Susan Chang, as next friend of A.C., a minor, and Justin Ho-Wee Wong (“Plaintiffs”) file this sur-reply to Defendant’s reply to Plaintiffs’ brief in opposition to Defendant’s motion to dismiss, respectfully requesting that the Court deny Defendant’s motion for the following reasons.

I. ARGUMENT AND AUTHORITIES

A. Host's and Glue Society's Actions are Imputed to Virgin.

To avoid providing information and documents responsive to Plaintiffs' discovery requests concerning the downloading of A.C.'s picture and contract with Justin Wong, Virgin objected on the ground that Plaintiffs' requests were, among other things, "not within the scope of jurisdictional discovery" and "premature pending a ruling on the Defendant's Motion to Dismiss."[1] It expediently expands its definition of jurisdictional relevance in its response, however, claiming that it was Host and Glue Society, not Virgin, that entered the contract with Justin Wong and directed the contacts with Flickr's server. Because the agency relationship that exists between Virgin, Host and Glue Society is beyond the issue of jurisdiction, it should be addressed in conjunction with the merits.

But even if this Court disagrees, Virgin cannot evade jurisdiction and liability by hiring another party to enter contracts and misuse images on its behalf. This is confirmed by basic agency principles, which uniformly establish that the principal is responsible for actions committed by the agent while the latter is acting under the direction of the former.[2] The result should be no different here.

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[1] *See* App. 6, Virgin's First Supplemental Objections and Answers to Plaintiffs' Interrogatories. Defendant provided these answers to Plaintiffs only after reviewing their draft motion to compel.

[2] *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356-57 (5th Cir. 2003) ("Agency is 'the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' An agency relationship may be demonstrated by written or spoken words or conduct, by the principal, communicated either to the agent (actual authority) or to the third party (apparent authority).") (citing RESTATEMENT (SECOND) OF AGENCY §1(1)); *Abramson v. Am. Online, Inc.*, 393 F. Supp. 2d 438, 441 (N.D. Tex. 2005)

It is clear from David Cain's deposition testimony that Virgin hired Host, controlled the campaign, and had the exclusive authority to decide which ad concepts and pictures to use:

> Q: Can you explain to me what your involvement was with the "Are you with us or what?" campaign?
>
> A: My involvement was to work with outside—our outside advertising vendor, Host, in order to get an advertising campaign to market.[3]
>
> * * *
>
> Q: [W]hat instructions did you give to Host to help them assist Virgin Mobile with this campaign?
>
> A: We asked to come—for them to come up with a range of concepts, advertising concepts, which would help people understand that if they were with Virgin Mobile that they could send another text message—send a text message to another Virgin Mobile customer for free.[4]
>
> * * *
>
> Q: Who was it that made the decision to choose the concept—was it you or was it Richard?
>
> A: Rich and I both decided, in consultation.[5]
>
> * * *
>
> Q: So Host was working at the instruction of Virgin Mobile?

(applying agency law to enforce contract against non-signatory); *Gaines v. Kelly*, 235 S.W.3d 179, 185 (Tex. 2007) (noting that "an agent's authority is presumed to be co-extensive with the business entrusted to his care").

[3] *See Cain deposition*, App. 13-14 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

[4] *Id.*, App. 14 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

[5] *Id.*, App. 15 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

A: Yes[6]

* * *

Q: So whose idea was it to use amateur photographs?

A: The—the concept that we went with, part of that concept was using these—the pictures from Flickr.

Q: Okay. That's the concept that you chose and accepted; is that correct?

A: Yes

Q: And did you personally pick that concept or did you say that you picked it in conjunction with Richard?

A: Yes, in conjunction with Rich.[7]

* * *

Q: Did you know where those pictures came from?

A: Yes

Q: And where was that?

A: I believe they came from a—an image-sharing web site called Flickr.[8]

* * *

Q: So would you say that Virgin pays Host every month?

A: We would pay them an amount of money every month, yeah, based on work they would do.[9]

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[6] *Id.*, App. 17 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

[7] *Id.*, App. 19 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

[8] *Id.*, App. 20 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

[9] *Id.*, App. 24 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

* * *

Q: So you create the guidelines and then they [Host] come back with the strategy and the creative?

A: Yeah, I normally—the guidelines—I—yes.

Q: Okay. And then you're ultimately responsible for selecting the campaigns that Virgin Mobile is going to use to promote its products; is that correct?

A: Ultimately, yeah, I'll approve advertising concepts.

Q: Okay. Did you have any communications with anyone at The Glue Society during the "Are you with us or what?" campaign?

A: They were present at meetings, yes.[10]

* * *

Q: Did Host get your permission before bringing Glue Society into the project?

A: Yes[11]

Although irrelevant to the issue of jurisdiction, it can be inferred from the above that Host and Glue Society were acting as Virgin's agents during the design and creation of the "Are you with us or what?" campaign; and rather than refusing to use pictures acquired from Flickr, Virgin ratified Host's and The Glue Society's actions by approving them for use in the campaign.[12] It follows, as a result, that the contacts and contracts that were initiated and created during the scope of the agency should be imputed to Virgin, just as if it had taken the actions itself.

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[10] *Id.*, App. 25 to Defendant's Reply to Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss.

[11] *Id.*

[12] *See Abramson*, 393 F. Supp. 2d at 441.

CONCLUSION AND PRAYER

For these and the reasons set forth in Plaintiffs' Opposition to Defendant's Motion to Dismiss, Plaintiffs respectfully request that the Court deny Virgin's Motion to Dismiss and permit the case to proceed to the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August 2008, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the Court's electronic case filing system. The system sent a "Notice of Electronic Filing" to the following attorneys of record, all of whom have consented to accept this Notice as service of the document:

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/s/ Ryan H. Zehl______________________
Ryan H. Zehl